

ESTTA Tracking number: **ESTTA1154146**

Filing date: **08/18/2021**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92075375
Party	Plaintiff Common Sense Press Inc DBA Pocket Jacks Comics
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Date	08/18/2021
Attachments	Response to Motion to Dismiss.pdf(243511 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

COMMON SENSE PRESS INC
DBA POCKET JACKS COMICS

Petitioner,

vs.

Cancellation No. 92075375

ANTONIO J. MALPICA AND
ETHAN VAN SCIVER

Registrant.

**PETITIONER’S RESPONSE TO
REGISTRANT’S MOTIONS TO DISMISS**

Petitioner COMMON SENSE PRESS INC DBA POCKET JACKS COMICS (“Petitioner”), through its undersigned attorney, respectfully submits this Response to Registrants ANTONIO J. MALPICA and ETHAN VAN SCIVER’s (collectively “Registrant”) Motion to Dismiss (“Motion”), pursuant to Federal Rule 12(b) of the Federal Rules of Civil Procedure.

The above-identified Petitioner respectfully requests that the Trademark Trial and Appeal Board deny Registrant’s Motion to Dismiss. Registrant claims that Petitioner’s Petition to Cancel (hereafter “Petition”) should be dismissed primarily because Petitioner “lacks a statutory cause of action to challenge the trademark registration which divests the Trademark Trial and Appeal Board of jurisdiction.” 18 TTABVUE 1. Registrant further argues that because Petitioner’s applications are allegedly void *ab initio* and because Petitioner allegedly had no *bona fide* intent, that Petitioner has no “entitlement to bring this cancellation” “or “statutory right to bring this cause of action.” *Id.* Thus, Registrant appears to argue that Petitioner has neither

standing nor sufficiently plead a claim for relief. *See* Fed. R. Civ. P. 12(b)(6). This is simply not the case as Petitioner has standing and has sufficiently met the pleading standards as required under the both the Federal Rules of Civil Procedure and the Trademark Rules of Practice and Procedure.

I. INTRODUCTION

As Petitioner will demonstrate, Registrant's Motion to Dismiss is baseless and consists of little more than ad hominem attacks and meandering arguments, often without addressing the Petitioner's claims. Because Petitioner has standing and has stated multiple claims upon which relief can be granted, Registrant's Motion pursuant to 12(b) should be denied.

II. RELEVANT FACTS

The present case has a somewhat lengthy procedural history despite Registrant still not having filed an answer. As such, the Petitioner will provide an overview of the history of this proceeding thus far.

On October 1, 2020, Petitioner filed a Petition to Cancel Registration No. 6,102,744 for the mark COMICS GATE. Petitioner alleges that Registrant made no use of his mark in commerce before filing his statement of use. The Petitioner also alleged that Registrant has abandoned his trademark, and that Registrant committed fraud upon the USPTO.

On November 9, 2020, Registrant ANTONIO J. MALPICA served upon Petitioner via email its purported answer. Petitioner notes that Registrant's purported answer was originally filed as a confidential document (*see* 4 TTABVUE).

On December 4, 2020, Petitioner filed its Motion for Judgment on the Pleadings, and in the alternative, Motion to Strike Registrant's Purported Response and Counterclaims. *See* 5 TTABVUE.

On December 10, 2020, Registrant ANTONIO J. MALPICA again, in violation of Board procedures, made three different confidential submissions to the Board and served copies upon Petitioner via email. *See* 6-8 TTABVUE.

On December 30, 2020, Petitioner filed a reply in support of its original Motion for Judgment on the Pleadings, and in the alternative, Motion to Strike Registrant's Purported Response and Counterclaims. *See* 9 TTABVUE. The same day, Petitioner likewise filed a motion in opposition to Registrant ANTONIO J. MALPICA's purported motion to dismiss that was filed on December 10, 2020 (*see* 6-8 TTABVUE). *See* 11 TTABVUE.

Thereafter, on April 15, 2021, Registrant ANTONIO J. MALPICA through their attorney, filed a motion to join Registrant ETHAN VAN SCIVER as a party. *See* 13 TTABVUE. It bears mentioning that the instant proceeding lists both ANTONIO J. MALPICA and ETHAN VAN SCIVER as co-defendants when in actuality the assignment agreement attached to the motion (*see* 13 TTABVUE) states that the Registrant's mark was conveyed in its entirety to ETHAN VAN SCIVER. As such, it is unclear to Petitioner whether ANTONIO J. MALPICA is still a party to this proceeding and whether the listed attorney represents ANTONIO J. MALPICA or ETHAN VAN SCIVER or both.

On July 6, 2021, the Board ruled on Petitioner's Motion for Judgment on the Pleadings, and in the alternative, Motion to Strike Registrant's Purported Response and Counterclaims, and granted Petitioner's alternative Motion to Strike Registrant's November 9, 2020 "answer." *See* 17 TTABVUE. Thereafter, the Board set August 2, 2021 as Registrant's deadline to answer.

On August 2, 2021, the Registrant filed a Motion to Dismiss which is the subject of this motion in opposition. *See* 18 TTABVUE.

III. ARGUMENT

A. REGISTRANT HAS REPEATEDLY FAILED TO PROPERLY SERVE COPIES OF FILINGS MADE WITH THE BOARD

In their July 6, 2021, order, the Board cautioned Registrant regarding its improper service of filings, and reminded Registrant that they must comply with the Board's service requirements as set forth in Trademark Rule 2.119. *See* 17 TTABVUE 2-3. Despite this warning, the Registrant, having been represented by counsel since at least as early as April 15, 2021, continues to repeatedly not serve copies of filings upon Petitioner or their attorney.

First, for the motion to join filed on April 15, 2021, Petitioner received no service copy from Registrant. Indeed, the certificate of service on Registrant's motion to join states that "I hereby certify that a true and complete copy of the foregoing MOTION TO JOIN A PARTY AND NOTICE OF APPEARANCE and attachments, have been served by email to: Francis John Ciaramella, Esquire at frank@fjcp LLC via the TTAB's ESTTA filing system on April 15, 2021." 13 TTABVUE 2 (emphasis added).

While the motion to join is relatively inconsequential in this proceeding, Registrant's August 2 potentially dispositive motion to dismiss is not. Again, and after the Board's July 6, 2021, order cautioning Registrant regarding proper service, Registrant, through their counsel, again failed to serve a copy of the motion to dismiss upon Petitioner. *See* 18 TTABVUE. Here, the only way Petitioner's counsel learned of the Registrant's motion to dismiss was through the email automatically generated by the ESTTA when the filing was made. Only upon further investigation did Petitioner's counsel learn of the motion to dismiss. Indeed, the Registrant again stated that "I hereby certify that a true and complete copy of the foregoing MOTION TO DISMISS and attachments, have been served by email to: Francis John Ciaramella, Esquire at

frank@fjcp LLC via the TTAB's ESTTA filing system on August 2, 2021." 18 TTABVUE 11 (emphasis added).

Based solely on Registrant's repeated failure to serve copies of filings upon Petitioner, Registrant's Motion to Dismiss should be denied. Under Trademark Rule 2.119(a), 37 C.F.R. § 2.119(a), every submission filed in an inter partes proceeding, except for the petition to cancel or notice of opposition, must be served upon the other party together with a certificate of service. All submissions must **actually** be served upon the other parties to the proceeding. *Cf., Equine Touch Found., Inc. v. Equinology, Inc.*, 91 USPQ2d 1943, 1944 n.5 (TTAB 2009); "The automatically generated ESTTA filing notice **does not constitute service** and does not relieve a party of its obligation to serve a copy of any filing pursuant to the Rules; the filing notice and actual service of the submission are independent of one another. To be clear, the filer is always required to serve the other party." *The Coffee Studio LLC v. Reign LLC dba Coffee Studio*, Cancellation No. 92066245 (precedential) (emphasis added).

As such, any documents not served upon Petitioner by Registrant must be stricken. *See* Trademark Rule 2.119; *see also The Coffee Studio LLC v. Reign LLC dba Coffee Studio*, Cancellation No. 92066245 (precedential) ("Because Respondent did not effect proper service in accordance with Trademark Rule 2.119, Petitioner's motion to strike is granted and Respondent's motion to dismiss will not be considered.").

Consequently, based solely on lack of service, Registrant's Motion to Dismiss should be given no consideration.

B. REGISTRANT AGAIN RESORTS TO AD HOMINEM ATTACKS ON PETITIONER AND ITS MARKS, AND ATTEMPTS TO INTRODUCE EVIDENCE OUTSIDE OF THE PLEADINGS

Here, most of the Registrant's arguments in favor of dismissal of the petition for cancellation are predicated upon Petitioner's applications being void *ab initio* or due to lack of Petitioner's *bona fide* intent. *See* 18 TTABVUE 1. Consequently, Registrant appears to argue that Petitioner has no real interest in this proceeding and that he is an "intermeddler." *Id.*

In Registrant's Motion to Dismiss, Registrant argues that the Board is not limited to the four corners of the complaint and that the Board can consider matters of the public record. *Id.* at 2. The Registrant argues that their motion to dismiss may be treated as a motion for summary judgment, which allows the parties an opportunity to present evidence and argument on that question. *Id.* "[T]he Board has allowed the conversion [to a motion for summary judgment] so long as the parties are given reasonable opportunity to present all material that is pertinent to the motion." *Id.* at 10.

Here, the Registrant is completely in error, and the Motion to Dismiss cannot and should not be construed as a Motion for Summary Judgment where evidentiary exhibits can be given consideration. As such, Registrant's meandering arguments regarding whether Petitioner's Application Nos. 88872841 and 88925542 are void *ab initio*, whether Petitioner possesses *bona fide* intent, whether Petitioner is a mere "intermeddler," and the purported "evidence" submitted by Registrant in support should be given no consideration.

"The circumstances in which the Board will treat a motion to dismiss relying on matters outside the pleadings as a motion for summary judgment **are very limited. A party may not file a motion for summary judgment until it has made its initial disclosures.**" TBMP § 503.04 (emphasis added); 37 CFR § 2.127(e)(1); *see Caymus Vineyards v. Caymus Medical Inc.*, 107

USPQ2d 1519, 1522 n.2 (TTAB 2013) (motion to dismiss amended counterclaim accompanied by evidence was not treated as a motion for summary judgment as there was nothing in the record which indicated that initial disclosures were served by opposer); *Zoba International Corp. v. DVD Format/LOGO Licensing Corp.*, 98 USPQ2d 1106, 1108 n.4 (TTAB 2011) (motion to dismiss considered as one for summary judgment where it asserts claim preclusion); *Qualcomm, Inc. v. FLO Corp.*, 93 USPQ2d 1768, 1769-70 (TTAB 2010) (motion for summary judgment denied as premature where movant had yet to serve initial disclosures). In fact, Registrant appears to be well aware that a motion for summary judgment at this stage is not only premature and improper, but also that initial disclosures must be served prior. *See* 18 TTABVUE 2 (where Registrant also cites *Zoba International Corp.*). Here, this is not a case of claim preclusion, and as such, initial disclosures would need to be served first (here, they have not).

In the present case, because a motion for summary judgment is premature, the Board must construe the motion to dismiss namely as that, a motion to dismiss. “Accordingly, when a motion for summary judgment would be premature, the Board will not consider a motion to dismiss **including matter outside the pleading to be a motion for summary judgment**, even if the parties treat it as such.” TBMP § 503.04 (emphasis added); *See* Fed. R. Civ. P. 12(d); *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1028 (TTAB 2015) (motion to dismiss that included matters outside of the pleadings not considered as motion for summary judgment because motion was filed before the parties’ initial disclosures were due and initial disclosures had not been served); *Wellcome Foundation Ltd. v. Merck & Co.*, 46 USPQ2d 1478, 1479 n.2 (TTAB 1998) (matters excluded); *Internet Inc. v. Corporation for National Research Initiatives*, 38 USPQ2d 1435, 1436 (TTAB 1996) (matters excluded).

Here, the Registrant has done just that and attempts to use their purported motion to dismiss more as a meandering ad hominem attack against the Petitioner and its marks rather than an attack on Petitioner's actual pleaded claims or standing. This appears to be a pattern of behavior on the part of the Registrant, regardless of whether they are represented by counsel. The Board, in granting Petitioner's Motion to Strike, recognized that "Mr. Malpica's submission of November 9, 2020, is less a cognizable answer to the petition under Fed. R. Civ. P. 8(b) than it is merely argument more appropriate to a brief on the case." 17 TTABVUE 3. While such mistakes are generally attributable, but not necessarily excusable, to the practice of *pro se* litigants, here, the Registrant through their counsel has again submitted a filing that presents nothing more than mere argument rather than a cognizable motion to dismiss. Similar to Registrant's purported "answer" filed on November 9, 2020, so too should Registrant's motion to dismiss be given no consideration.

Indeed, the overwhelming vast majority of Registrant's Motion to Dismiss is nothing more than meandering argument, attempting to litigate based on matters outside of the pleadings of this proceeding. Other than briefly touching on "a two part test to establish its statutory cause of action" (18 TTABVUE 7), which Petitioner will address below, the Registrant essentially spends **no** actual time arguing why the claims listed in the petition for cancellation are legally deficient, or how Petitioner has otherwise failed to state a proper claim for relief, or how the Petitioner lacks standing based on the claims of the pleadings. This is because Registrant's Motion to Dismiss is merely a motion to dismiss in name only, and only serves as a vehicle to present mere arguments and conjecture.

A motion to dismiss for failure to state a claim upon which relief can be granted is a test **solely** of the legal sufficiency of a complaint. TBMP § 503.02 (emphasis added); *Advanced*

Cardiovascular Systems Inc. v. SciMed Life Systems Inc., 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009), (quoting, *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007)); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216, 1218 (TTAB 1990); *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 753 (TTAB 1985).

“In order to withstand such a motion, a complaint need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). TBMP § 503.02; *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009); *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538, 1539 (TTAB 2000); *Kelly Services Inc. v. Greene’s Temporaries Inc.*, 25 USPQ2d 1460, 1462 (TTAB 1992); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990); *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 753 (TTAB 1985); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 (TTAB 1985); *Springs Industries, Inc. v. Bumblebee Di Stefano Ottina & C.S.A.S.*, 222 USPQ 512, 514 (TTAB 1984).

Here, the Registrant appears to argue that the Petitioner has not met “these prongs” due to “evidence” in the “public record” that is outside of the pleadings in the case. *See, inter alia*, 18 TTABVUE 7. Here, however, the purported “statements” relied upon by the Registrant are not only outside the scope of the determination of the legal sufficiency of the complaint but are likely hearsay as well. Similarly, the “evidentiary exhibits” are outside the pleadings. Likewise, the “evidentiary exhibits” are not properly authenticated, introduced, or otherwise stipulated to by the parties. Undeniably, the only way to view Registrant’s Motion to Dismiss is as mere argument, which is generally reserved for trial briefs.

To survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007) (retiring the pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957) that dismissal for failure to state a claim is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (plausibility standard applies to all federal civil claims); *Caymus Vineyards v. Caymus Medical Inc.*, 107 USPQ2d 1519, 1522 (TTAB 2013) (considering plausibility); *Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (considering plausibility); *Doyle v. Al Johnson’s Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). *See, e.g., Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (motion to

dismiss applicant's fraud, non-use and abandonment counterclaims granted); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014).

In the present case, the Registrant's Motion fails. The Registrant has not argued why Petitioner's complaint is legally insufficient. The Registrant has not stated why Petitioner's petition for relief is not plausible on its face. The Registrant has not stated with particularity why Petitioner lacks standing. Likewise, the Registrant has not argued how Petitioner's petition is mere threadbare recitals of elements of a cause (or causes) of action. This is because the Registrant cannot justifiably make such arguments, and instead hangs their proverbial hat on attacking Petitioner and its applications in support of their contention that Petitioner has no interest in the proceeding or reasonable belief of damages rather than attacking the petition (complaint) itself.

**1. PETITIONER'S APPLICATIONS AND REGISTRANT'S PURPORTED
"PUBLIC RECORD EVIDENCE" ARE OUTSIDE THE SCOPE OF THE
PLEADINGS AND REGISTRANT'S MOTION TO DISMISS**

First, Registrant argues that Petitioner's applications are void *ab initio*. See 18 TTABVUE 3. In support, Registrant alleges that this is due to Petitioner's purported lack of *bona fide* intent to use the mark. *Id.* However, whether the Petitioner had *bona fide* intent is not at issue in this proceeding, and such attacks are well outside of the confines of the determination of a motion to dismiss, which is again, one based solely on the legal sufficiency of any pleaded claims.

Second, the Registrant alleges that Petitioner's statements are in "the public record" and that Petitioner "is aware of the prior commercial use of COMICGATE." 18 TTABVUE 5. Again, such "statements" and "evidence" are outside the scope of the pleading as well as the determination of the legal sufficiency of Petitioner's claims. The "statements" likely constitute

hearsay, and the “evidence” has not been properly authenticated, introduced, or stipulated to by the parties. Here, the Registrant is well aware of and understands that it is largely basing its Motion to Dismiss upon purported “statements” made by the Petitioner outside of this proceeding. “Note, the proceeding admissions by CSP **make up the core** of Defendant’s motion.” 18 TTABVUE 6 (emphasis added). These purported statements continue for many pages of Registrant’s motion. *See, inter alia*, 18 TTABVUE 5-7. However, such “statements” are wholly irrelevant to the issue of the legal sufficiency of Petitioner’s petition, and whether Registrant’s Motion to Dismiss is proper.

Third, the Registrant appears to argue multiple times that they are the senior user of a similar trademark (common law or otherwise). *See, inter alia*, 18 TTABVUE 4, 7, 8, 10-11. This too, is not only outside the scope of the determination of a motion to dismiss but is also not at issue in this proceeding. This proceeding is not one of priority and a likelihood of confusion. Rather it is one surrounding whether Registrant failed to use their mark before a statement of use was filed, whether Registrant abandoned its trademark, and whether Registrant committed fraud upon the USPTO. *See generally* 1 TTABVUE.

And finally, and curiously, the Registrant argues that the suspension of Petitioner’s applications does not provide Petitioner with a presumption of a cause of action. 18 TTABVUE 9-10. This is simply not the case as Petitioner is and will be damaged because Registrant’s Registration No. 6102744 was cited by the USPTO as an impediment to registration of Petitioner’s Applications. *See* 1 TTABVUE 2. This is all in spite of the fact that Registrant (through the previous owner ANTONIO MALPICA) failed to use the mark in commerce before the statement of use was filed. The Petitioner likewise alleges specific and articulable facts in favor of this claim, as well as its claims of abandonment and fraud. *See generally* 1 TTABVUE.

Again, it bears repeating, that such arguments or claims are outside the scope of this proceeding, or in the very least, the instant motion to dismiss.

Again and again throughout this proceeding, the Petitioner is forced to respond to putative counterclaims. Similar to Registrant's November 9, 2020 "answer" (*see* 4 TTABVUE), instead of presenting actual legal arguments in favor of a motion to dismiss, the Registrant (now through counsel) instead resorts to mere ad hominem attacks on the Petitioner and their trademark applications as a basis to dismiss Petitioner's petition. As the Board noted in their July 6, 2021, order, Registrant's putative counterclaims to cancel Petitioner's pleaded applications should be given no consideration "because (1) pleaded applications are not subject to a counterclaim for cancellation, *see Int'l Tel. & Tel. Corp. v. Int'l Mobile Machs. Corp.*, 218 USPQ 1024, 1026 (TTAB 1983) (counterclaim to "refuse any application filed by petitioner" was improper), and (2) the counterclaim was not accompanied by the requisite fee. *See* Trademark Rules 2.6, 2.111(d), and 2.114(b)(3)(iii), 37 C.F.R. §§ 2.6, 2.111(d), and 2.114(b)(3)(iii); *Sunway Fruit Prods., Inc. v. Productos Caseros, S.A.*, 130 USPQ 33, 33 (Comm'r 1960) (fee requirement is statutory and cannot be waived)." 17 TTABVUE 3. If the Registrant does not agree with an allegation contained within the Petition they should file an answer and admit or deny each allegation.

C. PETITIONER HAS STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Moreover, the Petitioner has stated claims upon which relief can be granted. Under the liberal pleading rules of the Federal Rules of Civil Procedure (F.R.C.P.), Petitioner has clearly stated claims upon which relief may be granted. Fed. R. Civ. P. 8. Namely, Petitioner seeks to cancel Registrant's registration on the basis of abandonment, fraud, and failure to use the mark in

commerce before the filing of a statement of use. Petitioner's Petition for Cancellation gives ample notice of its claims.

"Rule 8 is the keystone of the system of pleading" in federal procedure, and "the functioning of all the procedures in the federal rules...are intertwined inextricably with the pleading philosophy embodied in Rule 8." *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15-16 (D.C. Cir. 2008) (citing CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202, AT 87-88 (3d ed. 2004)). The pleadings serve specific functions of giving notice of "the general nature of the case and the circumstances or events upon which it is based," so the parties can prepare and the court can dispose of the case properly. *Id.* at 16 (citing Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 457, 460 (1943)). Accordingly, Rule 8 requires, not a specific quantity of facts, but simply "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Moreover, the Court must treat the complaint's factual allegations, including mixed questions of law and fact, as true, drawing all reasonable inferences in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64 (D.C. Cir. 2003); *Holy Land Found for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); see also *Fame Jeans*, 525 F.3d at 14 (D.C. Cir. Apr. 29, 2008) (under Rule 12(b)(6), "a court must construe a complaint liberally in the plaintiff's favor, accepting all of the allegations in the complaint as true, even if doubtful in fact") (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

1. PETITIONER PROVIDES FACTS TO SUPPORT IS ABANDONMENT CLAIM

Here, Petitioner has plainly alleged facts, that if taken as true, show that Registrant has abandoned their registration. Specifically, Petitioner has alleged that Registrant has discontinued

using, and has not used for at least the past three years, and possibly longer, the COMCIS GATE mark as a trademark in the United States designating the source of “comics” in Class 016. 1 TTABVue 2-3. This factual allegation, which should be drawn in favor of Petitioner, shows that Registrant has stopped using his mark in commerce for a period of three years.

Furthermore, this fact, if taken as true, shows that Registrant also intended not to resume use. “Nonuse for **three consecutive years** shall be prima facie evidence of abandonment.” 15 U.S.C. § 1127 (emphasis added).

Consequently, Petitioner has alleged specific facts to show that Registrant has (1) stopped using the COMCIS GATE mark in commerce, if any; and (2) intended not to resume use of the same.

2. PETITIONER’S FRAUD CLAIM HAS MERIT

Here, the Petitioner has plainly stated and plead facts sufficient that, if taken as true, show that the Registrant has committed fraud. Specifically, the Petitioner alleged that “On April 24, 2020, Registrant signed a declaration under oath when he filed a statement of use with the U.S. Trademark Office declaring that the mark COMICS GATE was in use in commerce on or in connection with all of the goods/services listed in the application. Upon information and belief, such statements were false at the time they were made by the Registrant.” 1 TTABVue 3. The Petitioner also alleged that “prior to the filing of Registrant’s statement of use, and after registration, Registrant had not used the mark COMICS GATE in conjunction with ‘comics.’” *Id.*

Furthermore, the Petitioner alleged that “Registrant knew that his statements regarding his statement of use of the COMICS GATE trademark were false at the time such statements were made.” *Id.* at 4. The Petitioner then alleged that “Registrant knowingly made such false,

material misrepresentations with the intent to deceive the USPTO, as well as the relevant consuming public, and such false, material misrepresentations were relied upon by the USPTO.”

Id. The Petitioner also alleged that the “Registrant obtained the registration of his mark fraudulently by knowingly making a false, material, and intentionally deceptive representation to the USPTO that Registrant had used his Registration in commerce when he had not” and that “Registrant’s acts and material misrepresentations alleged herein represent a conscious effort by Registrant to attempt to procure a registration for the Registrant’s COMICS GATE mark to which Registrant knew he was not entitled.” *Id.*

Here, these specific allegations, which should be construed in favor of Petitioner, show that the Registrant has committed fraud upon the USPTO.

As such, the Petitioner has plainly stated and alleged specific facts that allow a reasonable inference that the Registrant intended to deceive the USPTO.

3. PETITIONER PROVIDES FACTS IN SUPPORT OF ITS CLAIM THAT REGISTRANT DID NOT USE THE MARK IN COMMERCE BEFORE THE STATEMENT OF USE WAS FILED

Here, the Petitioner has plainly stated and plead facts sufficient that, if taken as true, show that the Registrant has did not use its mark before filing their statement of use. Specifically, the Petitioner alleged that “On April 24, 2020, Registrant signed a declaration under oath when he filed a statement of use with the U.S. Trademark Office declaring that the mark COMICS GATE was in use in commerce on or in connection with all of the goods/services listed in the application.” 1 TTABVUE 4-5. The Petitioner alleged that Registrant had not used the COMICS GATE mark in connection with all of the listed goods as of April 24, 2020, and that the Registrant currently is not using the COMICS GATE mark in connection with all of the listed goods. *Id.* at 5.

Furthermore, the Petitioner alleged that “Registrant submitted attachments purportedly showing use of the Registration. Specifically, Registrant stated under oath that ‘I used the Mark as I was selling my book via crowdfund through indiegogo. The first image shows the date when my campaign was funded and it shows the display of my mark. The second image shows the first sales of my book which was sold during the use of my mark. The third image is of my youtube channel with the promotional video of my book and a clear image of the use of my mark to advertise my book.’” *Id.* The Petitioner alleged that all three images failed to demonstrate trademark use within the meaning of the Lanham Act. *Id.* at 5-6

The Petitioner then alleged that the “Registrant had not used his mark in commerce as of the filing of his Statement of Use on April 24, 2020 (or as of the registration date of his mark (July 14, 2020), or as of the time by which he was required to file his statement of use), such that Registrant’s COMICS GATE mark should be considered void.” *Id.* at 6.

Here, these specific allegations, which should be construed in favor of Petitioner, show that the Registrant did not use their mark at the time the statement of use was filed.

As such, the Petitioner has plainly stated and alleged specific facts that allow a reasonable inference that the Registrant did not use their mark at the time the statement of use was filed.

CONCLUSION

Based on the foregoing, it is evident that Petitioner has sufficiently stated multiple claims of relief and has standing. Taken together with the detailed allegations of Petitioner’s claims, Registrant’s Motion under 12(b) is inappropriate and should be denied. Furthermore, Petitioner has complied with the liberal pleading rules under the Federal Rules of Civil Procedure. And

finally, and putative counterclaims raised by Registrant should be given no consideration and dismissed.

Petitioner respectfully requests that Registrant's Motion be denied.

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Dated: August 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Response to Motion to Dismiss has been served on the following via email:

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